



# California Fair Political Practices Commission

November 20, 1985

Dennis A. Barlow  
Yuba County Counsel  
Courthouse - 3rd Floor  
215 Fifth Street  
Marysville, CA 95901

Re: Your Request for Written  
Advice Pursuant to Government  
Code Section 83114(b)  
Regarding Yuba County  
Supervisor J. E. McGill  
Our File No. A-85-227

Dear Mr. Barlow:

You have written requesting written staff advice pursuant to Government Code Section 83114(b) at the request of Yuba County Supervisor J. E. McGill who is currently serving as the Board's Chair. Supervisor McGill is a licensed contractor involved in road building for land divisions. He is also involved in installation of pipelines for domestic water and does some paving work. In the foothill area of the County (the district which he represents), he is one of four or five contractors who regularly bid on and construct these types of projects. Such contracting work is subject to inspection and approval by the responsible County department.

You have related that the following types of items come before the Board of Supervisors for projects by private individuals or firms.

1. Approval of a Subdivision Map pursuant to Subdivision Map Act (Government Code §66410 et seq.)
2. Approval of Parcel Maps pursuant to Subdivision Map Act (Government code §66410 et seq.)
3. Appeals of conditions imposed on either of the above maps by the Planning Commission.

4. Waiver of road and other improvements (either offsite or on site) otherwise imposed on either of the above maps by the Planning Commission.

5. Appeals of Conditional Use Permits and other zoning and development related entitlements from the decision of the Planning Commission.

6. Environmental Impact Reports or Negative Declarations pursuant to the California Environmental Quality Act relative to the above projects. (Public Resources Code §21050 et seq.)

In addition proposals come before the Board for road projects where the County will enter into a contract with a General Contractor and the type of work performed by Supervisor McGill would be the subject of a subcontract.

#### QUESTIONS

You have posed Supervisor McGill's questions to us as follows:

Supervisor McGill questions when one of the above matters is brought before the Board of Supervisors, and he has reason to believe he may present a closed sealed bid to perform work on the underlying project in his private capacity, should he abstain from voting? Should he abstain from any discussion on the matter before the Board? If he is chairing the meeting, should he surrender the chair for the duration of the matter?

#### ANALYSIS

You have attached to your letter copies of several opinions which your office has rendered to Supervisor McGill on related issues. Those opinions discuss, inter alia, Government Code Section 1090, et seq., and the common law doctrine of conflicts of interests. Because this agency administers only the provisions of the Political Reform Act (the "Act")<sup>1/</sup> we are unable to address those matters and would suggest that they be addressed to the Attorney General. However, we would urge that you review two Supreme Court Opinions that may be relevant to

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<sup>1/</sup> Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

1090 issues where a supervisor is involved in contractual dealings in his private capacity. Thompson v. Call (1985) 38 Cal. 3d 633; and Stigall v. City of Taft (1962) 58 Cal. 2d 565.

The Act provides that no official may make, participate in making or use his or her official position to influence the making of any governmental decision in which he or she knows or has reason to know he or she has a financial interest. Section 87100. Participation in a decision includes chairing a meeting.<sup>2/</sup> Consequently, when disqualification is required, it must be total and the official may neither chair the meeting nor otherwise participate in the deliberations, including lobbying other agency members.

The Act prescribes that disqualification will be required whenever a decision will have a reasonably foreseeable material financial effect upon the official or members of his or her immediate family or any one of several economic interests where the effect upon the interest is distinguishable from the effect upon the public generally. Section 87103 spells out what those interests are, the relevant ones to this question are as follows:

(a) Any business entity in which the public official has a direct or indirect investment worth one thousand dollars (\$1,000) or more.

\* \* \*

(c) Any source of income, other than gifts and other than loans by a commercial lending institution in the regular course of business on terms available to the public without regard to official status, aggregating two hundred fifty dollars (\$250) or more in value provided to, received by or promised to the public official within 12 months prior to the time when the decision is made.

(d) Any business entity in which the public official is a director, officer, partner, trustee, employee, or holds any position of management.

Section 87103(a), (c), (d).

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<sup>2/</sup> Opinion requested by Vincent Biondo, 1 FPPC Opinions 54 at 58, No. 75-036, July 2, 1975 (copy enclosed). In addition, Supervisor McGill may not use his official position to influence the decisions of County personnel who are inspecting his work as a private contractor.

In the instant situation, Supervisor McGill has an investment in his contracting business (JETCO Underground) and, as owner and officer of that business, he also has numerous sources of income through the business. The same things are true for his Cathedral Oaks Water Company and probably his gravel operation (although it is not entirely clear from his Form 721 whether that is a business which supplies others or whether it just supplies his own contracting business). As a 10 percent or greater owner of JETCO, customers of JETCO are sources of income to Supervisor McGill on a pro rata basis. Section 82030(a). Since he appears to be the sole owner of JETCO, any source of income of \$250 or more to JETCO is a source of \$250 or more of income to him.

You have asked whether Supervisor McGill is required to disqualify himself as to certain types of land-use decisions which may involve construction work. Disqualification is required if it is reasonably foreseeable that the decision will have a material financial effect upon any of Supervisor McGill's businesses or upon any source of income to him of \$250 or more during the preceding 12-month period. Thus if a land owner, for whom JETCO had constructed a roadway six months ago, came before the Board seeking approval for a development permit, a rezone, or any of the other matters specified, disqualification would be required.

If JETCO had a contract to do road work on a project, disqualification as to that project would likewise be required if the contract would result in JETCO receiving payments of \$250 or more in a 12-month period.<sup>3/</sup> If JETCO does not have the contract but has only bid or is considering bidding on the contract, the Thorner Opinion, 1 FPPC Opinions 198, No. 75-089, December 4, 1975 (copy enclosed), provides important guidance on the subject of foreseeability.

In example (a), Director MacPhail has no known connection with the project, although McPhail's, Inc. later may bid on or supply to the project certain materials. On these facts alone, we cannot find a reasonably foreseeable financial effect on McPhail's. McPhail's has numerous competitors in each product it sells, except ready-mix concrete (for which there are three major competitors). The situation is unlike

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<sup>3/</sup> This assumes that Supervisor McGill owns 100% of JETCO. A contract would constitute a promise of income within the meaning of Section 87103(c).

that of United States v. Mississippi Valley Generating Company, supra, where "there was a substantial probability that, because of its prior experience in the area of private power financing, First Boston would be hired to secure the financing...." 364 U.S. at 555. Therefore, a material financial effect upon McPhail's participation in the decision whether to grant a variance is not prohibited.

In example (b), McPhail's is preparing or has made a bid to supply one or more of its products, but no award has yet been made. It is possible, of course, that there could be special circumstances present which would indicate that there is only a remote likelihood of McPhail's being awarded a supply contract. For example, McPhail's might have a reason for making a bid even though it is clear the contract will be awarded elsewhere. Under such circumstances, no financial effect on McPhail's would be reasonably foreseeable and Director MacPhail would not be disqualified from participation in the variance decision.

As a general rule, however, when the bid is made with a serious hope that the contract will be awarded to McPhail's, we think a financial effect on McPhail's is reasonably foreseeable even if there is substantial competition. The statute requires foreseeability, not certainty. Furthermore, the fact that a seriously competitive bid on the project is being prepared or has been made is likely to focus the attention of the Director on the fact that he may benefit if a variance is granted. The ultimate test is whether the element of foreseeability, together with the other elements discussed earlier, is present to the point that the official's "unqualified devotion to his public duty" might be impaired. People v. Darby, 114 Cal. App. 2d 412, 433 (1952). Under the circumstances described in example (b), we conclude that the financial effect on McPhail's is reasonably foreseeable and that Director MacPhail, therefore, must not vote or participate in the variance decision.

In example (c), we are told that a contractor who is a regular customer of McPhail's and who normally buys principally or only from McPhail's, is preparing to bid on or has bid on the project and, if awarded

the contract, probably will purchase some of McPhail's products for the job. In example (d), we are told that such a contractor already has been awarded the contract but has not yet purchased or agreed to purchase any of McPhail's products for the project.

There is a significant difference between the two situations. In example (d), although there is no certainty that McPhail's will receive business, there is a high probability that it will since the contractor who has been awarded the contract is a regular customer. Although there is no agreement, express or implied, cf. People v. Deysher, 2 Cal. 2d 141 (193), between McPhail's and the contractor, there is, without question, a sufficient likelihood that McPhail's will receive business to make the financial effect on Director MacPhail "reasonably foreseeable."

In example (c), on the other hand, an extra degree of remoteness is added to the foreseeability of the financial effect by reason of the fact that the contractor has not yet been awarded the contract, but merely has entered a bid or is preparing to do so. McPhail's will benefit only if the contractor's bid is successful and the contractor follows its normal practice of purchasing from McPhail's.

In the case of a contractor who in the past has purchased only from McPhail's Inc., it is reasonably foreseeable that Director MacPhail's decision could have a material financial effect upon McPhail's, Inc. However, where the contractor-applicant purchases from vendors other than McPhail's, Inc. we cannot conclude that a financial effect on McPhail's is reasonably foreseeable. Nevertheless, if in this latter example there are facts indicating that the contractor's bid is likely to be successful, the financial effect would be reasonably foreseeable since the situation then becomes analogous to example (d). In the last analysis, what is reasonably foreseeable must depend on the facts and circumstances of each specific situation.

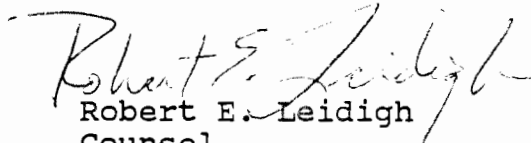
If it is reasonably foreseeable that JETCO will be affected under the guidelines set forth in Thorner, then the next question is whether the effect will be material as to JETCO. The standard for materiality as to a sole proprietorship

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business entity is found in 2 Cal. Adm. Code Section 18702.2(g) (copy enclosed). Thus, if the foreseeable effect upon JETCO will be \$10,000 in additional gross revenues, disqualification will be required. A similar analysis would be applied with respect to Cathedral Oaks Water Company. For instance, if it is likely that a subdivision would acquire its water from Cathedral Oaks, then the same analysis would be applicable.

I trust that this letter responds to Supervisor McGill's general questions. As to any specific decision, if he desires specific advice, he should contact us at that time and we will respond. If you or Supervisor McGill have questions regarding this letter, I may be reached at (916) 322-5901.

Sincerely,

  
Robert E. Leidigh  
Counsel  
Legal Division

REL:plh  
Enclosures

# The County of Yuba

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October 23, 1985

Fair Political Practices Commission  
110 K Street  
Sacramento, CA 95814

Re: Request for Opinion: Supervisor J. E. McGill

Gentlemen:

As County Counsel for the County of Yuba I have been asked by Supervisor J. E. McGill to request an opinion pursuant to Government Code §83114(b) on potential conflicts of interest by Supervisor McGill.

Supervisor McGill took office in January of 1983 as the representative of the 5th Supervisorial District in Yuba County. This district covers approximately 1/2 of the County land area and is located in the northeasterly portion of the county covering the entire foothill and mountainous portion of the County. In January, 1985 Supervisor McGill was selected by the Board of Supervisors to serve as Chairman for 1985.

Supervisor McGill is a licensed contractor involved in road building for land divisions. He is also involved in installation of pipelines for domestic water and does some paving work. In the foothill area of the County he is one of four or five standard contractors on these types of projects. Such contracting work is subject to inspection and approval by the responsible County department. I have attached a copy of his most recent conflict of interest statement for your information.



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The following relevant types of items come before the Board of Supervisors for projects by private individuals or firms:

1. Approval of a Subdivision Map pursuant to the Subdivision Map Act (Government Code §66410 et seq.)
2. Approval of Parcel Maps pursuant to the Subdivision Map Act (Government Code §66410 et seq.)
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Supervisor McGill questions when one of the above matters is brought before the Board of Supervisors, and he has reason to believe he may present a closed sealed bid to perform work on the underlying project in his private capacity, should he abstain from voting? Should he abstain from any discussion on the matter before the Board? If he is chairing the meeting, should he surrender the chair for the duration of the matter?

I have enclosed copies of the following related opinions or memoranda from our office addressed to Supervisor McGill:

October 2, 1985  
April 2, 1985  
March 22, 1985

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Thank you for your attention to this matter. If there is any additional information I can provide please contact me.

Very truly yours,

DENNIS A. BARLOW  
County Counsel

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cc: All Supervisors